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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 72-1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, *Appellee*

v.

JOHN RODNEY CARD, *Appellant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

IN THE

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OCTOBER TERM, 1972

UNITED STATES OF AMERICA, *Appellee*

v.

JOHN RODNEY CARD, *Appellant*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appellant, John Rodney Card, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in the above case.

OPINIONS BELOW

On July 22, 1971, Appellant John Rodney Card was charged in an indictment with four Counts of mail fraud

in violation of 18 U.S.C. § 1341. After an eight day jury trial Appellant was acquitted on Count One and convicted on Counts Two, Three and Four. On April 17, 1972, Appellant was sentenced to three years on each Count to be served concurrently, and is now presently enlarged on bail in the sum of $15,000.00. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on December 6, 1972, and is as yet unpublished. A copy of that opinion is printed as Apdendix "A" to this Petition. The order of the Court of Appeals below denying Petition for Rehearing was entered on January 4, 1973, and is printed as Appendix "B" to this Petition.

JURISDICTION

The judgment sought to be reviewed from the United States Court of Appeals for the Fifth Circuit was originally entered on December 6, 1972. Appellant's request for Rehearing was denied without opinion on January 4, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. The failure of the Government to disclose the names of material fact witnesses after orders to do so from the United States Magistrate and the United States District Court.

2. The effect of restrictions imposed by a Motion in Limine concerning the negligent acts of the United States Attorney.

3. The failure to afford Appellant a speedy trial.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 18 United States Code,

Federal Rule of Criminal Procedure, Rule 48(b).

Rule 48. Dismissal

"(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT OF THE CASE

For several years prior to his conviction for mail fraud, Appellant John Rodney Card was the sole operator of a junk yard for used aircraft and firearms. For the most part this was a one man operation and as busy men are prone to do he often ran his business in a sloppy manner.

During these years of operation Appellant Card sold used and salvaged aircraft and firearm parts through the

United States Mail to thousands of purchasers throughout the United States, Mexico and Canada.

Due to the very nature and volume of the mail order business there were purchasers who had complaints about their orders. Because of several complaints, on December 12, 1969, Appellant was arrested and charged with four Counts of mail fraud. No indictment was filed and seventeen months later on April 22, 1971, Appellant was advised by the government that the charges against him had been dismissed. After these actions by the government, Mr. Card continued his business under the assumption that matters had been satisfactorily resolved and lost or destroyed many records, papers, and correspondence for which he assumed he had no further use. Then on July 22, 1971, without any notice and quite to the astonishment of Appellant Card he was indicted on the same charges that had earlier been dismissed.

Through the intervening months between the first arrest and the subsequent indictment the government gave no indication of further interest in this matter. In fact it was later revealed that the reason for the long delay in pursuing prosecution was simply inadequacy or lack of diligence on the part of the office of the United States Attorney. In addition, the record discloses that Appellant Card had three different attorneys during these months and each attorney had numerous discussions with Assistant United States Attorney, Dewey Meadows. When the charges were officially dismissed, Appellant assumed that as a result of these discussions the government was satisfied that no scienter was involved, and that the prosecutor had concluded that he had no basis to pursue the allegations of intent to commit fraud by use of the mails.

Prior to the trial at a hearing before United States Magistrate Blask, the Assistant United States Attorney was ordered to disclose the names of the government's witnesses and produce the documents to be introduced by these various witnesses. Despite the efforts of Appellant's attorneys this information was not forthcoming until the trial started and Appellant's surprise and inability to prepare for an effective cross-examination constitutes his first point for review.

At the time of trial the government requested a Motion in Limine to prohibit the Appellant from presenting to the jury the facts of Appellant's earlier arrest, dismissal and subsequent arrest and indictment on the same charges. Appellant objected claiming that if the jury was not permitted to hear these facts, which predicated the destruction of material records, it would prejudice his case because the jury would not be informed as to why Appellant could not produce the records that would establish his innocence.

The court granted the government's motion and Appellant seeks a new trial due to the prejudice caused by such a restriction to his defense.

There was twenty-five months between Appellant's first arrest and his trial. An unexcused delay of this long is a violation of Appellant's Sixth Amendment right to a speedy trial. The fact that the first arrest and charges were dismissed after seventeen months does not excuse the government from abiding by the Constitution when its only excuse is negligence or lack of diligence. The government's dismissal and subsequent indictment and trial several months later go to show a plan by the United States

Attorney's to conceal inefficient or ineffective interoffice procedure and to deprive the Appellant of the spirit of the Sixth Amendment.

The trial court denied Appellant's Motion to Dismiss the indictment and he was found guilty on three Counts of mail fraud.

We seek reversal of the denial.

REASONS FOR GRANTING THE WRIT

1.

The surprise caused to the Appellant by the failure of the United States Attorney to disclose prior to trial, the names and addresses of a number of out-of-state witnesses, whose testimony was ultimately offered as evidence of similar transactions, to bolster the primary witnesses placed the Appellant at such a severe disadvantage in the preparation of his defense as to constitute prejudicial error.

Appellant Card was tried before a jury on January 14, 1972. His primary defense was predicated on the theory that he did not possess the requisite criminal intent necessary for a conviction of mail fraud. In order to adequately prepare this defense Card filed a Motion for Discovery and Inspection on October 13, 1971, and just prior to trial a Motion for a Bill of Particulars, asking for the names of undisclosed witnesses that the prosecution indicated they planned to call.

The government answered Appellant's first request by stating that a list of witnesses would be "furnished to the defense at the proper time before trial, if and when a trial

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in this case is called." (R. 937). The government waited until January 17, 1972, after the commencement of the trial, to disclose to Appellant's counsel the names and the specific nature of the testimony they had decided to elicit from the witnesses. (R. 1080).

Appellant objected to the testimony of these witnesses because the government had deliberately failed to disclose their names and produce the documentation, in spite of Magistrate Blask's and Judge Bue's orders.

Judge Blask ordered both counsel for the government to meet and for the government to disclose the name of the witnesses and turn over the documentary evidence to the defense.

Appellant's counsel and the United States Attorney met once, but no documentary evidence was revealed nor were the names of the witnesses disclosed in such a manner as to be helpful to the defense.

The witnesses that were allowed to testify were not residents of Texas, but rather from several different states and there was no way for Appellant's counsel to have an opportunity to investigate and prepare his cross-examinations of these material witnesses.

The prejudice caused by the failure of the government to disclose and the appearance of the unknown witnesses was best stated by the trial judge:

> "I think what concerns the court most is perhaps that its instructions to counsel are not as clear as they should be for pre-trial exchange of information and perhaps that will simply have to be chalked up to this court's inexperience. (This one was of the first few criminal trials presided over by the court.)

I don't like a situation developing in which any element of surprise can be leveled at the proof that develops in the case."

"I feel particularly in a criminal case every effort absent unusual circumstances should be made to appraise the defendant of the matters that are going to be brought forth against him in the trial and . . ."

"The problem here is one of appraising the other side of the individuals who are going to be called upon to testify." (R. 294, 295).

Appellant's primary defense was that although he may have been guilty of sloppy business practices and failing to keep adequate records, he was nevertheless, not guilty of a willful scheme to defraud individuals by the use of the mails. (R. 34-37).

After the conclusion of the trial, Appellant received statements from two of the jurors, which although not revealing misconduct did reflect that the government's case on intent was weak and that the failure to disclose and the subsequent use of the non-disclosed witnesses was highly damaging.

2.

The effect of restrictions imposed by a Motion in Limine concerning the negligent acts of the United States Attorney prejudiced Appellant's defense.

On January 13, 1972, the Court granted the government's request for a Motion in Limine directing defense counsel and all defense witnesses not to imply or in any manner refer to any negligence whatsoever on the part of the government in bringing or prosecuting this suit. (R. 955).

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Because of the ruling Appellant was only permitted to develop the simple facts of dismissal and subsequent indictment, without a full airing of the reason for such action. Obviously, this denied the jurors a full disclosure of the total situation.

Under the facts at bar it should have been within the province of the jury to judge the credibility of Appellant Card's testimony concerning lost or destroyed records. *United States v. England*, 347 F.2d 425 (2nd Cir. 1965). In order to better evaluate Mr. Card's defense the jury should have heard the facts concerning the government's negligence, lack of diligence and unnecessary delay, rather than an inference, absent these facts, that it was neither unusual nor extraordinary in any way.

The materiality of the granting of the government's motion goes directly to the credibility of Appellant Card. Were Card's testimony believed by the jurors he would not have been found guilty. The court in an effort to be fair usurped the function of the jury by excluding material facts.

This error taken in conjunction with the non-compliance of the United States Attorney's to the orders of the court which frustrated a large part of the defense preparation, created an atmosphere around this case that requires a full airing of the facts relating to the prosecution.

When it apears that an error may have affected in substantial degree the rights of a defendant, the power of reversal should be exercised by the Appellate court. *J. C. Carble Corporation v. Farmers Liquid Fertilizer, Inc.*, 346 F.2d 91 (8th Cir. 1965); *Sunkist Growers, Inc. v. Winchler and Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960).

We seek a reversal of the government's Motion in Limine and a new trial to fully explore the facts of the United States Attorney's office in prosecuting this case.

3.

The Appellant was denied his constitutional right to a speedy trial.

The Appellant was arrested on December 21, 1969, for mail fraud. After seventeen months these charges were dismissed. But again on July 22, 1972, Appellant was arrested and indicted on the same charges. He was finally brought to trial on January 17, 1972. Over two years after the first arrest.

In considering whether a defendant has been denied his Sixth Amendment constitutional right to a speedy trial the court takes into consideration a number of factors:

> "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportion: the length of delay, the reason for the delay, the prejudice to the Defendant, and waiver by the Defendant." *United States ex rel Cseh v. Fay,* 313 F.2d 620, 623 (2nd Cir. 1963); *Oden v. United States,* 410 F.2d 103, 105 (5th Cir. 1969).

These factors are not to be treated independently as separate prerequisites to the Sixth Amendment's right to a speedy trial rather, they are interrelated and must be read together. *United States v. Mark II Electronics of Louisiana, Inc.,* 305 F. Supp. 1280 (E.D. La. 1969).

I. Length of Delay:

A speedy trial without unnecessary delay is guaranteed to all defendants in criminal matters in the Federal Court.

See *e.g., United States v. Jorn,* 400 U.S. 470 (1971); *Smith v. Hooey,* 393 U.S. 374 (1969). For the accused, the delay may mean imprisonment, anxiety, prejudice to his defense, or all three of these. *E. g., United States v. Ewell,* 383 U.S. 116 (1966); *Hinton v. United States,* 424 F.2d 876 (D.C. Cir. 1969). The Federal Courts have not pinpointed an exact amount of delay in prosecution which would constitute a violation of the Defendant's constitutional rights. However, the courts have held that:

> "A delay of more than one year between arrest and trial raises a speedy trial claim of prima facie merit." *Hinton v. United States, supra.*

Although there was only six months between the date Appellant was indicted and his trial in the District Court, he wishes to point out to this Court that he was initially arrested on December 12, 1969, over two years prior to trial. During the major portion of this time Appellant was on bond and subject to arrest, harassment, and unfavorable publicity. Additionally, Appellant was cajoled into the specious belief that the government was no longer interested in his prosecution and that the records concerning the December charges were no longer of vital importance. These records were subsequently lost or destroyed, and without them it was impossible for the Appellant to adequately prepare his defense.

II. Reason for the Delay:

The government has not come forward with any legitimate reason for the twenty-five month delay in the prosecution of the Appellant and therefore, any assumption made by the Appellant would be mere speculation. How-

ever, since the July 22, 1971, indictment evolved from the same complaints that triggered the December 16, 1969, charges, it is obvious that the government had all of the case from the date of the first arrest. Therefore, any delay or negligence was on behalf of the office of the United States Attorney.

Recently, the Fifth Circuit held that the government has a duty to press criminal cases to trial, to give them any necessary priority, and to prevent whenever possible, even the suggestion of staleness. *United States v. Mark II Electronics of Louisiana, Inc., supra; Hodges v. United States,* 408 F.2d 543 (8th Cir. 1969). Additionally, the Appellant points out that he never requested any continuance or extension of time. Any delay in the prosecution of the Appellant was not of his making.

III. Prejudice to the Defendant:

Many courts have held that this aspect of the right to a speedy trial is the most important factor to be considered. *E. g., United States v. Mark II Electronics of Louisiana, Inc., supra; Trigg v. Mosely,* 433 F.2d 364 (10th Cir. 1970); *State v. Rice,* 235 N.E.2d 732 (Ohio, 1968). Our Constitution presumes prejudice from the fact of trial other than speedy. Otherwise, the constitutional guarantee has no purpose. Here, Appellant suffered a specific and positive and definite prejudicial effect from the delay by being duped into believing that the government had chosen not to prosecute, and then losing or destroying certain material records.

> "The fundamental rights to a speedy trial, its origin tracing back at least to the Magna Carta, is designed in part to insure that a criminal defendant is not

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> rendered unable to rebut charges against him because (of) undue delay . . . ." *Pitts v. State of North Carolina,* 395 F.2d 182, 184 (4th Cir. 1968).

It should be clear to this Court that the Appellant was gravely prejudiced by the twenty-five month delay between the original arrest in December 1969, and the trial held during the month of January 1972. Whether calculated or not, a more devastating scheme could not have been connived to prejudice an accused defendant. Here, the government arrested Appellant and charged him with mail fraud. They waited seventeen months, filed no indictment and then dismissed the charges, leading Mr. Card to believe that the matter had been disposed of. Then a few months later without warning or notice arrested Card and filed an indictment against him on the same charges of mail fraud.

IV. Waiver by the Defendant:

The final factor to be considered, is whether the Appellant waived his right to a speedy trial if he had not made a demand for a trial. The trend of the courts today is away from a strict interpretation of that rule. In *Hedgepeth v. United States,* 364 F.2d 684 (D.C. Cir. 1966), the court expressed doubts about the dogmatic acceptance of the waiver rule and said:

> "[I]t must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial. The government may not 'sit back' and then argue defendant's inaction conclusively waived his right to a speedy trial." at 688.

The waiver doctrine was questioned again in *United States v. Richardson,* 291 F. Supp. 441 (S.D. N.Y. 1968),

in which the court stated that the general presumption against waiver of constitutional rights should be applied in cases involving the right to a speedy trial:

> "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and * * * 'do not presume acquiescence in the loss of fundamental rights.' " at 446.

The court in *Richardson* case held that, the test of waiver was to be whether there was "an intentional relinquishment or abandonment of a known right or privilege". This doctrine has been repeatedly affirmed by our highest court. See *e. g., Glosser v. United States,* 315 U.S. 60 (1942); *Fay v. Noia,* 372 U.S. 391 (1963); *Brookhart v. Janis,* 384 U.S. 1 (1964); *Miranda v. State of Arizona,* 384 U.S. 436 (1966).

In dismissing the indictment, the court in *United States v. Mark II Electronics of Louisiana, Inc.,* 283 F. Supp. 280, 283-284 (E.D. La. 1968) said:

> "[I]n some instances, 'to require a man to beg for a trial on such a charge, with its enormous penalty, requires too much of human nature. *United States v. Chase,* 135 F. Supp. 230 (N.D. Ill. 1955) (indictment for murder). It is frequently true that it is unrealistic to force a man to demand the very thing which he is trying to avoid."

In addition, Card had not even been indicted after the first arrest, therefore he would have had to be asking for the government to do more than it would be reasonable to require of any man.

For the foregoing reasons, therefore, Appellant contends that considering the above four factors in the light of all

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the circumstances of this case, the Appellant's Motion to Dismiss the indictment with prejudice under the Sixth Amendment should be granted.

Appellant also claims that the indictment should have been dismissed under Rule 48(b) of the Federal Rules of Criminal Procedure, which provides:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against the defendant, who has been held to answer to the district court, or there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint."

The power of the court to dismiss an indictment under Rule 48(b) is broader than that under the Sixth Amendment. *Mann v. United States,* 304 F.2d 394 (D.C. Cir. 1962). It has been held that Federal Criminal Rule 48 (b) by providing for dismissal for "unnecessary delay" goes beyond the Sixth Amendment and supplies broader grounds for the exercise of discretion in dismissing indictments for want of prosecution. In *United States v. Mark II Electronics of Louisiana, Inc., supra,* the court held that the question of whether or not the defendants waived their right to a speedy trial does not have to be considered in ruling on a motion to dismiss under Rule 48(b).

For dismissal on a non-constitutional ground under Rule 48(b) the only factor which the Appellant must prove is that the delay was unnecessary. There is no need for a showing of prejudice.

Since the Appellant has shown that a twenty-five month delay elapsed in this case (seventeen months between the

first arrest and dismissal and eight months between second arrest and trial) and that absolutely none of the delay is attributable to him, he has presented a *prima facie* case of unnecessary delay. See *Hedgepeth v. United States, supra.*

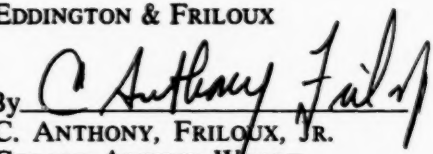
Once the Defendant has made a *prima facie* case for unnecessary delay, the burden shifts to the government to prove that the delay was necessary. At bar, the government offered no proof to show necessity in the delay, and therefore, has failed to carry its burden of proof. Accordingly, this court should grant Appellant's Motion to Dismiss the indictment on the grounds that there has been an unnecessary delay in bringing this case to prosecution which resulted in the prejudice to the Appellant.

CONCLUSION

For the reasons heretofore stated John Rodney Card respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDDINGTON & FRILOUX

By 

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1897
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RODNEY CARD,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(December 6, 1972)

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

PER CURIAM: The defendant-appellant, John Rodney Card, appeals from his conviction on three counts of mail fraud in violation of 18 U.S.C. 1341. We affirm.

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Card's first contention is that his conviction should be reversed because the Government allegedly failed to disclose the names of its witnesses prior to trial. It is well established that in noncapital cases the Government is under no obligation to disclose the names of witnesses. *United States v. Persico,* 2 Cir. 1970, 425 F.2d 1375, cert. denied, 400 U.S. 869. In the present case however, the court in its discretion issued an order requiring disclosure, and the Government subsequently revealed the names of twenty prospective witnesses. Since there was no showing that the witnesses testifying for the Government were not among those whose names had been disclosed, we conclude that the contention is without merit.

Card's second contention is that he was denied a speedy trial. The record indicates that he was tried within six months of the indictment. He was at liberty on bond during this period and made no demand for a trial. Furthermore, the defendant has not shown that he was prejudiced by the delay. We must conclude, therefore, that the appellant has made no showing that he was denied his right to a speedy trial. *Dyson v. United States,* 5 Cir. 1972 ____ F.2d ____, (No. 72-1889, November 7, 1972); *Barker v. Wingo,* 1972, ____ U.S. ____, ____ S.Ct. ____, 33 L.Ed.2d 101.

The appellant also contends that he was prejudiced by the dismissal of the original complaint against him because he subsequently threw away or lost certain records that would have been beneficial to the defense. There is no indication, however, what these records were or that the Government ever suggested to him that his prosecution had been abandoned or that he could safely destroy any documents. Thus, there is no basis for holding that the

Government should have been estopped from further prosecution.

The appellant's final contention is that the trial court erred in refusing to permit him to inquire into the prosecuting attorney's alleged negligence in dismissing the original complaint against the appellant. The appellant, however, failed to show the relevancy of this issue, and the trial court properly excluded it as a collateral matter.

The decision of the trial court must be AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1897
Summary Calendar

D. C. Docket No. CR-71-H-200

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RODNEY CARD,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under sub-

mission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 6, 1972

Issued as Mandate:

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. S72-1897

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN RODNEY CARD,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(Filed January 4, 1973)

ON PETITION FOR REHEARING

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.